IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of:	:	Before the Examiner:
Childs et al.	:	Peugh, Brian R.
	:	
Serial No.: 10/618,213	:	Group Art Unit: 2187
Filing Date: July 11, 2003	:	
	:	Lenovo (United States) Inc.
Title: AUTONOMIC	:	Building 675
NON-INVASIVE BACKUP AND	:	4401 Silicon Drive
STORAGE APPLIANCE	:	Durham, NC 27709

REPLY BRIEF UNDER 37 C.F.R. §41.41

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

    This Reply Brief is being submitted in response to the Examiner's Answer dated April 20, 2007, with a two-month statutory period for response set to expire on June 20, 2007.

I.   RESPONSE TO EXAMINER'S ARGUMENTS:

    A.   Response to Examiner's assertion that Symantec discloses "a program appliance comprising a program attachable in data communication with the computer" as recited in claim 1, as discussed on page 6 of Examiner's Answer.

The Examiner asserts that a boot disk is a program appliance based on Appellants' language which states "[t]he program appliance 207 may be one of several types of appliances, so long as the appliance 207 provides for at least read-only storage." Examiner's Answer, page 6. Appellants respectfully traverse. As Appellants stated in Appellants' Second Appeal Brief, a boot disk may refer to a disk that contains the operating system ready to load into the computer. Appellants' Second Appeal Brief, page 3. This does not correspond to a program appliance. The definition of a program appliance is not a floppy disk that may function as read-only as asserted by the Examiner. Examiner's Answer, page 6. The Examiner must provide a basis in fact and/or technical reasoning to support the assertion that a Ghost Boot Wizard that creates boot disks, as disclosed in Symantec, is the same as a program appliance comprising a program attachable in data communication with the computer. *Ex parte Levy*, 17 U.S.P.Q.2d 1461, 1464 (Bd. Pat. App. & Inter. 1990). That is, the Examiner must provide extrinsic evidence that must make clear that a Ghost Boot Wizard that creates boot disks, as disclosed in Symantec, is the same as a program appliance comprising a program attachable in data communication with the computer, and that it would be so recognized by persons of ordinary skill. *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999). Since the Examiner has not provided any such objective evidence, the Examiner has not presented a *prima facie* case of anticipation in rejecting claim 1. M.P.E.P. §2131.

    B.   Response to Examiner's assertion that Symantec discloses "a data storage appliance attachable in data communication with the computer" as recited in claim 1, as discussed on pages 6-7 of Examiner's Answer.

The Examiner asserts that Symantec's teaching of a CD-ROM can be interpreted as a data storage appliance attachable in data communication with the computer. Examiner's Answer, page 6. Appellants respectfully traverse. The

Examiner has failed to explain the rationale connection between Symantec's teaching of boot disks with CD-ROM support that let you access images stored on the CD-ROM (page 19 of Symantec) and a data storage appliance attachable in data communication with the computer. The pending claims must be given their broadest reasonable interpretation <u>consistent with the specification</u>. *In re Hyatt*, 211 F.3d 1367, 1372, 54 U.S.P.Q.2d 1664, 1667 (Fed. Cir. 2000); M.P.E.P. §2111. The broadest reasonable interpretation of the claims must also be <u>consistent with the interpretation that those skilled in the art would reach</u>. *In re Cortright*, 165 F.3d 1353, 1359, 49 U.S.P.Q.2d 1464, 1468 (Fed. Cir. 1999); M.P.E.P. §2111. Since the Examiner has not provided a reasonable interpretation of a data storage appliance attachable in data communication with the computer that is consistent with the specification or consistent with the interpretation that those skilled in the art would reach, the Examiner has not presented a *prima facie* case of anticipation for rejecting claim 1. M.P.E.P. §2111.

      C.   <u>Response to Examiner's assertion that Symantec discloses "wherein the program is configured to copy the files from the hard drive to the data storage appliance without installation of the program on the hard drive" as recited in claim 1, as discussed on pages 7-9 of Examiner's Answer.</u>

The Examiner asserts that Symantec discloses "wherein the program is configured to copy the files from the hard drive to the data storage appliance without installation of the program on the hard drive" as recited in claim 1. The Examiner presented his reasoning on pages 8-9 of Examiner Answer. Appellants could not logically follow the Examiner's reasoning as to why Symantec discloses the above-cited claim limitation.

The Examiner appears to agree with Appellants that the Norton Ghost software is installed on the hard drive of the computer. Examiner's Answer, page 8. The Examiner continues by asserting that Norton Ghost software is used to create boot disks. *Id.* The Examiner then concludes that the program (Ghostpe.exe) is run from the boot disk, which is an appliance, and hence Symantec discloses a program configured to copy the files from the hard drive to the data storage appliance without

installation of the program on the hard drive. *Id.* There is no support for the Examiner's interpretation. For example, the program Ghostpe.exe runs on the computer (see page 16 of Symantec) and hence does not support the Examiner's assertion that Ghostpe.exe is not installed on the hard drive. The Examiner later asserts that a copy of Ghostpe.exe is already installed on the hard drive and hence does not need to be installed onto the hard drive from the floppy disk. Examiner's Answer, page 9. The Examiner has not provided any basis for such an interpretation. Where does Symantec teach a copy of Ghostpe.exe is already installed on the hard drive and that the file Ghostpe.exe does not need to be installed onto the hard drive from the floppy disk? Neither is there any language that discloses a data storage appliance.

The Examiner must provide a basis in fact and/or logical reasoning to support the assertion that Symantec's teaching of running the executable file Ghostpe.exe on computers is the same as a program that is configured to copy the files from the hard drive to the data storage appliance without installation of the program on the hard drive. *Ex parte Levy*, 17 U.S.P.Q.2d 1461, 1464 (Bd. Pat. App. & Inter. 1990). That is, the Examiner must provide extrinsic evidence that must make clear that Symantec's teaching of running the executable file Ghostpe.exe on computers is the same as a program that is configured to copy the files from the hard drive to the data storage appliance without installation of the program on the hard drive, and that it would be so recognized by persons of ordinary skill. *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999). Since the Examiner has not provided any such objective evidence, the Examiner has not presented a *prima facie* case of anticipation for rejecting claim 1. M.P.E.P. §2131.

        D.   <u>Response to Examiner's assertion that Symantec discloses "wherein the program appliance and the data storage appliance are the same appliance" as recited in claim 2, as discussed on pages 9-10 of Examiner's Answer.</u>

The Examiner asserts that page 27 of Symantec discloses "wherein the program appliance and the data storage appliance are the same appliance" as recited in claim 2. Examiner's Answer, page 9. Appellants respectfully traverse.

Symantec instead discloses selecting either the source hard drive and partitions or selecting the image file as well as selecting either the destination hard drive and partitions or selecting the image file. Page 27. There is no language in the cited passage that discloses that the program appliance and the data storage appliance are the same appliance. Thus, Symantec does not disclose all of the limitations of claim 2, and thus Symantec does not anticipate claim 2. M.P.E.P. §2131.

Further, Appellants respectfully traverse the Examiner's interpretation of Symantec and respectfully traverse the Examiner's interpretation of claim 2 on pages 9-10 of Examiner's Answer in concluding that Symantec discloses the limitations of claim 2. The pending claims must be given their broadest reasonable interpretation consistent with the specification. *In re Hyatt*, 211 F.3d 1367, 1372, 54 U.S.P.Q.2d 1664, 1667 (Fed. Cir. 2000); M.P.E.P. §2111. The broadest reasonable interpretation of the claims must also be consistent with the interpretation that those skilled in the art would reach. *In re Cortright*, 165 F.3d 1353, 1359, 49 U.S.P.Q.2d 1464, 1468 (Fed. Cir. 1999); M.P.E.P. §2111. Since the Examiner has not provided a reasonable interpretation consistent with the specification or consistent with the interpretation that those skilled in the art would reach, the Examiner has not presented a *prima facie* case of anticipation for rejecting claim 2. M.P.E.P. §2111.

Further, the Examiner must provide a basis in fact and/or technical reasoning to support the Examiner's interpretation of Symantec. *Ex parte Levy*, 17 U.S.P.Q.2d 1461, 1464 (Bd. Pat. App. & Inter. 1990). That is, the Examiner must provide extrinsic evidence that must make clear that Symantec inherently discloses these assertions, and that it would be so recognized by persons of ordinary skill. *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999). Since the Examiner has not provided any such objective evidence, the Examiner has not presented a *prima facie* case of anticipation for rejecting claim 2. M.P.E.P. §2131.

E. Response to Examiner's assertion that Symantec discloses "wherein the program is further configured to execute automatically upon the program appliance being attached to the computer" as recited in claim 3, as discussed on page 10 of Examiner's Answer.

The Examiner asserts that Appellants have argued in connection with the rejection of claim 3 that Symantec does not disclose that the program is further configured to execute automatically and immediately upon the program appliance being attached to the computer. Examiner's Answer, page 10. Appellants respectfully traverse. Appellants merely asserted that Symantec does not disclose that the program is configured to execute automatically upon the program appliance being attached to the computer, as specifically recited in claim 3. See Appellants' Second Appeal Brief, pages 7-9.

F. Response to Examiner's assertion that Symantec discloses "a network in data communication with the computer; and a server computer in data communication with the network, wherein the data communication between the data storage appliance and the computer is provided through the server" as recited in claim 5, as discussed on pages 11-12 of Examiner's Answer.

The Examiner focuses on pages 99-100 of Symantec as support for the assertion that Symantec discloses "a network in data communication with the computer; and a server computer in data communication with the network, wherein the data communication between the data storage appliance and the computer is provided through the server" as recited in claim 5. Examiner's Answer, pages 11-12. In particular, the Examiner focuses on a table in Symantec which describes different cloning situations between the master and the slave (e.g., one computer containing the source file and the other computer containing the destination file). Page 99. There is no language though that discloses that the data communication between the data storage appliance and the computer is provided through the server. The Examiner is not clear as to what constitutes the data storage appliance, the computer or the server. Is the Examiner asserting that the master is the server? If so, then what is the data storage appliance or the computer? Further, what is the Examiner's support that the master (e.g., computer containing the destination disk) provides communication

between the data storage appliance and the computer? The Examiner must provide a basis in fact and/or technical reasoning to support the assertion that Symantec discloses that the data communication between the data storage appliance and the computer is provided through the server. *Ex parte Levy*, 17 U.S.P.Q.2d 1461, 1464 (Bd. Pat. App. & Inter. 1990). That is, the Examiner must provide extrinsic evidence that must make clear that Symantec discloses that the data communication between the data storage appliance and the computer is provided through the server, and that it would be so recognized by persons of ordinary skill. *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999). Since the Examiner has not provided any such objective evidence, the Examiner has not presented a *prima facie* case of anticipation for rejecting claim 5. M.P.E.P. §2131.

      G.   <u>Other matters raised by the Examiner.</u>

      All other matters raised by the Examiner have been adequately addressed above and in Appellants' Second Appeal Brief (1/18/2007) and therefore will not be addressed herein for the sake of brevity.
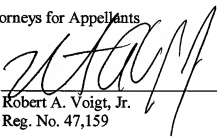
II.   CONCLUSION:

For the reasons stated above and in Appellants' Second Appeal Brief (1/18/2007), Appellants respectfully assert that the rejections of claims 1-7 are in error. Appellants respectfully request reversal of the rejections and allowance of claims 1-7.

Respectfully submitted,

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